

January 31. 1771.

## ANSWERS

FOR

Messrs GIBSON and BALFOUR Merchants in Edinburgh,

TO THE

PETITION of WILLIAM INNES Merchant in London.

**T**HE respondents, the pursuers in the present action, were unfortunate enough in the course of their dealings, and in the period of a few months, to purchase from James Scot merchant in Edinburgh, nine different bills of exchange, all drawn by him at sixty days date, upon Messrs Annand and Colhoun of London, amounting to L. 2570 Sterling.

The first seven of these bills were accepted, but the two last, for L. 300 each, bearing date 12th December 1769, were not; and Annand and Colhoun having in the mean time failed, none of them were paid, but returned dishonoured and protested.

On the afternoon of the same day on which Mr Scot sold these bills to the respondents, he, from certain circumstances, was led to entertain apprehensions with regard to the credit of Annand and Colhoun; and therefore, that the two bills sold to the respondents, and other two, of L. 100 each, sold to order of James Seton and of Andrew St Clair,

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Esq;

Dec. 12.  
1769.

Esq; might not be dishonoured, he bethought himself of the expedient of making a remittance equal to the sum in the bills, to be lodged as a deposit in the hands of a friend at London, in order that he might do honour to the draughts, in case, upon enquiry, it should be found there was danger in placing the money in the hands of Annand and Colhoun.

The person chosen as the trustee or *depositarius* for the above purpose, was the petitioner Mr William Innes, to whom, of the same date with the draughts, Mr Scot wrote the following letter: ' Mr William Innes, Dr Sir, By disappointment of remittances from Mr Ebenezer M'Culloh and Co. I have some reasons to fear, that Messrs Annand and Colhoun may be obliged to stop payment, unless Mr Annand, now here, can obtain the securities he is labouring to get, viz. Lord Dumfries and George Young. I was so unlucky as this day, before I heard of any demur in their affairs, to draw on Messrs Annand and Colhoun for L. 800 in four bills, as under, viz.

|                                                |               |
|------------------------------------------------|---------------|
| ' To order of Gibson and Balfour, at 60 d'. d. | L. 300        |
| ' To order of the same                         | 60 d'. d. 300 |
| ' To order of James Seton                      | 60 d'. d. 100 |
| ' To order of Andrew St Clair, Esq;            | 6 d'. d. 100  |

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L. 800

' I send you inclosed Johnstone and Smith's bill, 40 days date, on Glyn and Co. for L. 800. If they accept my bills, and are going on, I beg you will put them in possession of this L. 800 bill; if not, I have directed Mr Colhoun to send them to your good self, if the holders will take that trouble; and I beg you will accept them for my honour. I have also directed they would send to you any other bills of mine running on them to you for payment, which I shall make provision for, as I should not wish they returned here. The post hurries me, so I have

'have only time to add, I am respectfully, Dr Sir, yours,'  
&c.

And, upon the 14th, Mr Scot again wrote to the petitioner in the following terms: 'I wrote you last post just as the post was going, and I hope you will excuse the hurry I was in; my letter inclosed you Johnston and Smith's bill on Glyn and Halifax for L. 800 at 40 ds. d. which you will please (if Messrs Annand and Colhoun are going on) deliver to them; if not, you will be so good as credit my account for the same, and accept for honour two bills I drew same date to Messrs Gibson and Balfour of L. 300 each, at 60 ds. d.; one bill to order of James Seton at 60 ds. d. for L. 100; and one bill to Andrew St Clair, Esq; at 60 ds. d. for L. 100 Sterling; in all L. 800. The holders whereof, Messrs A. and C. will inform you of; or Messrs Gibson and Balfour, Mr James Seton, and Mr Andrew Sinclair will direct their correspondents to call on you with them, as I have applied them for that purpose. If this stop happens, (as I doubt not it will), it is owing to E. M'Culloh and Co. not remitting for retiring bills drawn on A. and C. to a large amount, on account of their not being able to pass their bills here, by reason of the large quantity of them in the circle, and a great stock of linen goods on their hands; though it is thought here, that by next post they will get such a supply by the credit of their friends from the new (or Air) Bank, and the other banks, in bills, as might have prevented all the mischief; and a house in town would have assisted them till they had reduced the circulation to a small matter, which they could have managed. This night I hear Messrs M'Culloh and Young's friends are meeting again, to try what can be done to mend things. As I have sundry bills on Messrs Annand and Colhoun now running, and accepted, my friends Messrs Gibson and Balfour propose to lend me their assistance on this occasion; and say, if you

Dec. 14<sup>th</sup>  
1769.



‘ you will retire my bills as they come due, and accept my draughts to their order, and write them a letter to that purpose, in course of post, and that you will do so, they will assist and enable me to supply you with good remittances, to keep you fully remitted, until I can get matters easy, which will be by the term of Whitsunday next, in a progressive way. In hopes of hearing from you in course, I am truly, Dr Sir, your’s, &c. Please to negotiate the inclosed bill on John Bright in Bristol, and credit my account for the amount when in cash, being L. 57: 12: 3.’

The connection of Annand and Colhoun with Ebenezer M’Culloh was well known to the respondents; and therefore, hearing of M’Culloh’s failure upon the 13th, the day immediately subsequent to the purchase of the bills, they instantly applied to Mr Scot for relief; but he thereupon represented to them, that they might rest perfectly satisfied, without taking any steps against him, for that he had provided for the honour of their draughts, by the deposit of a sufficient sum of money in the hands of Mr William Innes, merchant at London; and, in evidence of this assertion, he read to them, from his letter-book, a copy of the letter of the day preceeding, viz. the 12th, to Mr Innes.

The respondents accordingly rested satisfied in this security, and took no step against Mr Scot for securing the sum due to them, which otherways they could easily have done, before his bankruptcy had been made public.

- Dec. 12. One of the bills purchased from Mr Scot was sent by the  
 1769. respondents to Biggar and Hamilton of London, upon the day it was purchased; and, upon the 14th, the day immediately subsequent to the above conversation with Mr Scot, and the first post day to London, the respondents wrote to them the following letter: ‘ Yesterday Ebenezer M’Culloh and company, of this place, stopt payment; we have the pleasure to advise you, we have not the least connection with them: As the consequences of this failure may per-  
 Dec. 14. haps



'haps prevent Annand and Colhoun from accepting our last remittance to you ; you will, in that case, present it to William Innes, who will accept it for honour of the drawer ; if he does not, you will send us a protest for non acceptance, and keep the bill till further orders.

The other of the bills was sent the same date, to Bogles and Scot of London ; and likewise, upon the 14th, a letter was wrote to them by the respondents, of the following tenor : ' Should a remittance, in our last, of L. 300 on Annand and Colhoun, be refused acceptance, you'll present it to William Innes, for honour of the drawer ; and, if he don't accept it, transmit us a protest thereon for non acceptance, keeping the bill till further orders. ' Dec. 12.

In answer to the letter which Mr Scot wrote to Mr Innes upon the 12th of December, he, in course of post, received a letter, in the following terms : ' I wrote you the 11th, and have your favour the 12th inst. and am sorry for what you write about your fears regarding Annand and company, in case they do not get some securities and assistance. I notice you had drawn on them to Gibson and company, 60 days date, L. 600 ; to James Seton L. 100 ; and to Andrew St Clair L. 100 ; L. 200 which you desire I may accept for your honour, *which I shall do, if necessary.* and I have Johnston and company's bill on Glynn and company, due January 24th, L. 800 to your credit. I see you desire I may give Annand and company said bill, if they are going on ; as to which, I shall consider. I was out of town to day, and have not seen them, nor heard of them. I notice you also desire I may pay other drafts of yours on Annand and Colhoun, and I shall enquire what there is of them ; you have a good deal to remit me soon, and I hope you will not delay ; money will be useful during the winter, &c. ' Dec. 14.

In a few days thereafter Mr Scot failed, and retired to the sanctuary, where he was booked upon the 2d January. U- Dec. 16.

pon the forenoon of the 23d December, the respondents, at the desire of Mr Scot, wrote to Mr Innes, in order to propose means for aiding Mr Scot's credit, and relative to their own affair. The letter contains this paragraph: ' Mr Scot showed your letter of the 16th, agreeing to accept two bills, he had drawn on Annand and Colhoun, to our order, at 60 days date, on the 12th per L. 300 each, if necessary, for his honour, which we have duly noted, and are respectfully.'

Upon the evening of the same day, the 23d, the respondents learned from their correspondents, that Mr Innes had refused to honour the drafts which they had purchased from Mr Scot; whereupon they wrote to him the following letter, upon the 28th of December: ' Sir, We wrote you the 23d current, at Mr Scot's desire, and were surprised that evening to find you had not accepted, for his account, those two bills drawn by him on Annand and Colquhoun, for L. 300 each, to our order, which you had agreed to do, by your letter of the 16th to Mr Scot; and that gentleman having now stopt payment, and, as we rested our security for the payment of those bills on your letter agreeing to accept them, we were obliged to raise a summons against you, for accepting and paying these bills, and have laid an arrestment in the hands of Messrs Alison and Campbell of this place, on the dependence of the process; we however took care to inform them, that our arrestment was only on account of a dispute subsisting between us, and to bring on the determination of it before our courts in Scotland. It was with extreme regret, that, in these ticklish times, we took this step; but we could not avoid it, without being wanting to ourselves; and we take the first opportunity to inform you of it, that you may loose the arrestment, by giving bail to stand trial here.'

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Some further correspondence ensued upon this letter, unnecessary to be recited. The sum of it was, that Mr Innes had applied the L. 800 to his own credit, and refused either to make payment to the respondents of the sum in their draughts, to which they thought themselves well intitled, or even to submit the difference to merchants; whereupon they were advised to bring the present action against him, concluding for exhibition of the letters of correspondence, and for payment of the L. 600, with the interest, exchange, re-exchange, &c.

This cause having come before the Lord Coalstoun as Ordinary, he pronounced the different interlocutors recited in the petition. In support of which the following answers are humbly submitted.

The facts material for the determination of this case are scarcely controverted betwixt the parties; and, in the course of their argument, the respondents will assume the three following as established. In the *first* place, That the sum of L. 800 was remitted to the petitioner for the special purpose of answering those draughts which Mr Scott sold to the respondents and other two gentlemen, upon the 12th of December: Mr Scott's letters of the 12th and 14th do fully instruct this fact. *2dly*, It is instructed by the returns of Mr Innes upon the 16th of December, that he did receive this L. 800, with which he promises to accept of the bills which Mr Scott had drawn, if necessary; that is, if not accepted and paid by Annand and Colhoun. *3dly*, Intimation of the purpose of remitting the L. 800 to the petitioner was made to the respondents upon the 13th of December, when they went to Mr Scott for the purpose of procuring relief or security; being induced to make that demand by the alarm they had received by the bankruptcy of M'Culloh, and the apprehension there was that the failure of Annand and Colhoun would be the consequence thereof.

This last fact, of intimation being made to the respondents



ents upon the 13th, though not directly controverted, is insinuated by the petitioner to stand solely upon the averment of the respondents themselves. But this is not the case; for, if it had been necessary, the respondents could have instructed the fact by the oath of Mr Scot, who could not fail to remember his reading the letter from his copy-book to the respondents, when they applied to him for relief upon the 13th. But it did not appear to either party that there was occasion for further evidence upon the subject; the *res gesta* itself affords real evidence of it. For your Lordships will observe, that the above-recited letters from the respondents to their correspondents at London, bearing date so early as the 14th of December, expressly desire them to present the draughts to Mr Innes, in case they are not honoured by Anand and Colhoun; an instruction they certainly could never have given, unless the letter of the 12th from Mr Scot to Mr Innes had been previously intimated to them; and Mr Scot also, in his letter of the 14th, informs the petitioner, that he had intimated to the purchasers of these four bills to make the necessary application to him.

So standing the case, the respondents are advised, and do humbly maintain, that, where one person delivers money to another to be paid to a third party, and that the money is received upon these terms, the person who receives the money becomes bound to the third party as his *mandatarius* or *negotiorum gestor*. By receiving the money upon these terms, an obligation is established between the receiver and the third party, which the receiver, at the suit of the third party, is bound to implement. And therefore, in the present case, although no intimation had been made to the respondents of the letter to Mr Innes, and although they had had no knowledge thereof, still the obligation would have been good against him, for the interposition or consent of the third party is not necessary for constituting this obligation. As the transaction is intended solely for his behoof, the law presumes his

his consent to it; and from that presumption, and the delivery of the money, the obligation between the receiver and the third party does arise.

It is altogether immaterial to enter into any controversy with the petitioner with regard to the powers of Mr Scot to have recalled his mandate to Mr Innes, or to have directed the application of the money in any other way than as first directed. It is sufficient for the respondents, in a question with this petitioner, to say, that Mr Scot did not recall this mandate, nor give any direction with regard to the application of the money, different from his original order upon the 12th of December. But further, not only did Mr Scot not recall the order of the 12th at any after period; the respondents do contend it was not in his power to have recalled it, after the intimation to them upon the 13th, in the manner already narrated. Informed of the failure of M'Culloch, and suspecting the failure of Annand and Colhoun as the consequence thereof, they went to Mr Scot, upon the 13th of December, and desired to be relieved from the purchase of the bills which they had made the preceding day, not yet accepted, being resolved, if satisfaction was not given to them, they must operate their relief in the most effectual manner; and they would have been under no difficulty to do so before the failure of Scot became public. But he still hoping to stand his ground, and desirous to avoid the consequences which must immediately ensue, if the respondents had proceeded to diligence, he intimated to them, as recorded in his letter-book, the order he had transmitted the preceding day to Mr Innes; and, after all this, the respondents are advised, and do contend before your Lordships, that Mr Scot neither did nor could recall the mandate, nor direct the application of the money deposited with Mr Innes in any other manner than as already directed in favour of the respondents. From the moment of this intimation, the property of that money was transferred to them.

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Let the case be supposed, that, posterior to this transaction upon the 13th, diligence had been used in the hands of Mr Innes to affect this deposit as still the property of Scot, the respondents are advised, that, in a competition with those arresters, they must have been preferred, upon this plain and simple ground, that, in virtue of the deposit in the hands of Mr Innes, and the intimation of it to them, the money became appropriated to their payment only, and could not be carried away by the creditors, or any others claiming in the right of Mr Scot: And this doctrine the respondents apprehend to have been considered and solemnly approved by your Lordships, in the decision Andrew Stalker against Andrew Aiton, 19th February 1759. Indeed, if there is any difference, the present case is stronger than that of Stalker; for, as the case is related in the Faculty Collection, it does not appear that Trotter, the common debtor, had made any intimation to his creditors of the consignment for their behoof in the hands of Aiton, which is otherwise in the present case, and therefore an additional circumstance to corroborate the general proposition maintained by Aiton in the question with Stalker.

The petitioner is pleased to say, that there is no similarity betwixt the case of Stalker and Aiton, and the present; because, that a *jus quasitum* was secured to the creditors in the case of Aiton, by the obligation he had granted to the several creditors for their respective shares; whereas, in the present case, there was no such *jus quasitum* to the respondents, by the letters of correspondence betwixt Mr Scot and the petitioner.

But this observation is altogether unavailable to create any solid difference betwixt that case and the present. For, although there is a difference in the circumstances of the fact, and in the mode of creating the *jus quasitum* to the creditors; yet there is no difference to prevent an application of the principle of law in the one case to that of the other.

Aiton



Aiton was no more than the trustee of Trotter the common debtor ; and therefore his granting an obligation to the creditors of Trotter for their respective shares of the proceeds of the goods, was, in effect, neither more nor less than an intimation to them of the money being lodged in his hands for their behoof. But how is it possible to argue, that an intimation made by the trustee of the debtor can be stronger than an intimation made by the debtor himself ? and yet such is the plea of the petitioner, when he denies to the respondents the inferences they draw from the intimation made to them by Mr Scot upon the 13th of December, of the money being deposited in the hands of Mr Innes for their behoof.

In opposition to these principles maintained on the part of the respondents, the petitioner has referred to two decisions, *Inglis contra Clark*, 21st July 1697 ; and Lord Ross *contra Gray*, 17th January 1706. The proposition of both these decisions is the same viz. that an appropriation of a fund for payment of a particular creditor did not put that fund out of the power of the debtor, or withdraw it from his property, so as not to be subject to the diligence of other arresting creditors. But an obvious answer occurs to both those decisions, namely, That, in them, there was no *jus quesitum* secured to any particular creditor ; because the appropriation by the debtor had never been intimated to the creditor for whom it was intended ; so that it stood solely upon the footing of the mandate of the debtor, which it was in his power to recall, and of course the money attachable by other creditors. But that is noways similar to the present case, where, by the intimation of Mr Scot to the respondents, the money deposited with Mr Innes had become their right, which, as already shewn, Mr Scot could not revoke, and of course no right remained with him attachable by the diligence of his creditors.

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At the same time, your Lordships will be pleased to observe, that, in combating the case of an arrester, the respondents are stating their own case in a more unfavourable point of view than they have any occasion to do. For, in answer to the petitioner's plea, that Mr Scot could have recalled the order he had given, the respondents have only to state themselves as in the case of a multiple-poin ding, wherein they and Mr Scot were competitors; and, in that view of the case, it is, with submission, impossible to argue, that Mr Scot would have been allowed, after the letter to Mr Innes upon the 12th, and the intimation thereof to the respondents upon the 13th, to have set himself in opposition to their drawing this money out of the hands of Mr Innes; and, if so, it is equally impossible to maintain, that, after the intimation to the respondents upon the 13th, there remained a power with Mr Scot to apply the depomite in Mr Innes's hands to any other purpose than for behoof and payment of the respondents draughts, in the manner already directed by his letter upon the 12th.

Upon this branch of the respondents argument, the petitioner has always pleaded upon the case of a person giving orders to his factor or correspondent, which orders he was at liberty to alter or recall as he thought proper; although, perhaps, the result of that first order or resolution might have brought some benefit to a third party, if adhered to; but that this was not sufficient to create a *jus quasitum* to that third party. But the respondents have no earthly occasion to enter into any discussion of, or controversy relative to these general principles or observations suggested on the part of the petitioner. The obvious answer to them, when applied to the present case, will occur to your Lordships from what has already been stated. The petitioner totally omits the circumstance which occurs in the *species facti* of the present case, namely, the intimation made to the respondents of the depomite which had been put into his hands for the purpose

pose of answering their bills ; and this intimation made, not in an overly manner, but for the special purpose of giving them security, which otherways they might have taken to themselves in a legal manner, being alarmed with the apprehensions for the failure of Annand and Colhoun.

The petitioner says, it is affected on the part of the respondents to say, that they put any reliance upon the security derived from the deposit in Mr Innes's hands, so as to prevent them from having recourse to diligence, if they had been under apprehensions with regard to the security of Mr Scot ; and, for proof of this, reference is made to a letter from the respondents upon the 23d of December, said to be wrote after the respondents had learned from their correspondents of the dishonour of the bills they had purchased from Scot ; and yet they did not proceed to do any diligence against the effects of Mr Scot, whom they considered to be sound at the bottom, even so late as the said 23d of December.

But it is, with submission, very extraordinary to maintain, that the respondents did not consider themselves to have derived any security from this deposit in Mr Innes's hands, when it clearly appears, that, upon the day immediately subsequent to the purchase of those bills, they had taken the alarm and gone to Mr Scot, and, upon hearing the letter from him to the petitioner, had rested satisfied, without demanding any other relief or security ; and accordingly, in like manner, when they were afterwards obliged to have recourse to legal diligence, in order to relieve themselves from their other engagements with Mr Scot, they had recourse to no diligence upon account of this debt, trusting to the relief already secured to them in the hands of the petitioner.

And, with regard to the observations founded upon the letter of the 23d of December, they are very ingenious, but they proceed upon a mistake in point of fact ; for, in place of being wrote in the evening after receiving the account of the dishonour of their bills, as supposed in the petition, it

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was wrote in the forenoon and delivered to Mr Scot to be transmitted in his letter, as the respondents could satisfy your Lordships, by condescending upon some very minute circumstances, if thought to be necessary. At the same time, the respondents, upon perusal of the letter of the 23d, cannot discover how it conveys any strong sense in their minds of the undoubted security of Mr Scot; they write to Mr Innes an account of Mr Scot's circumstances as desired by himself; but the substance of the letter is to inform Mr Innes, that, without his indemnity, as he himself terms it, they would not engage deeper in the affairs of Mr Scot, which is certainly not expressing that strong sense of the fundamental soundness of Mr Scot, which the petitioner is pleased to impute to them.

So far with regard to the right which the respondents derived from the letter wrote to Mr Innes, and the money deposited in his hands, and with regard to the power which Mr Scot is supposed to have had to defeat the right which the respondents had procured by the foresaid letter and deposition. It remains still to consider how far it was in the power of the petitioner, the depositor of this money, for the behoof of the respondents, to defeat the right otherways secured to them.

If the petitioner had not been a creditor to Mr Scot, it will not be pretended, that by an arbitrary act or deed of his he could defeat the right intended for the respondent, by applying the money, for example, to the payment of another creditor of Mr Scot's. If he had such a power, therefore, it must arise from the character of creditor to Mr Scot, which he says he was possessed of at the time this money was remitted to him; but the respondents are advised that this his character of creditor to Mr Scot gave him no such power as that for which he now contends in his own favour.

For, when any person voluntarily, and without the compulsion of law, puts money into the hands of another, he is  
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intituled to do it under such terms and conditions as he shall think proper. In the cases even of indefinite payment, it has been a question of much dispute, in what manner a debtor was to impute these payments, whether in the manner most beneficial for himself, or in the manner most beneficial for his creditor, or in the manner that may be most equally conducive for the interest of both; but it never was made a question, or at least regarded as such, so far as known to the respondents, that, after a debtor had expressly imputed a sum of money for one purpose, it was in the power of his creditor to apply it differently.

There was a case decided by your Lordships in the year 1767, which seems to have gone upon this principle. The case is not collected, and the respondents are obliged to state it upon the information they have received relative to it. Arthur Dunlop, and others, in company, of Glasgow, had a credit with Coutts and Co. in Edinburgh; Dunlop, for himself, had another credit with them; Dunlop made some remittances to be placed to the company-account; but, as the debit of his own was great, they placed it to his own account, and advised him therewith; to which he answered, That, since they had done so, it might stand; however, on Dunlop's failure, the question came to be tried, and the court found, that these remittances fell to the account of the company, and not to the private account of Mr Dunlop, because the advice making them had so ordered, which Coutts and Co. could not alter, on their own accord, to the prejudice of the company.

The respondents do not say that this case resembles the precise circumstances of the present, but it so far aids the general ground of argument, as it shows the sense of your Lordships, that a creditor is not at liberty to make an arbitrary imputation of the money he receives, according as he may think most conducive for his own particular interest.

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But, *a fortiori*, every argument which can apply against an arbitrary imputation of the money received by a creditor from his debtor, applies to the present case: For here the question is not, whether a man shall be allowed to apply the money received for his own behoof, to the payment of one debt or another, but whether he shall be allowed to apply the money of other people to the payment of his debt. The respondents do say, the money of other people; for they have submitted to your Lordships, that by the letter from Scot to Innes, upon the 12th, and intimated to them upon the 13th, they had a *jus quesitum* in the money, which it was not in the power of James Scot to disappoint. It became their money before ever it was in the hands of Mr Innes; and, therefore, he was no more at liberty to apply it to his own payment, than any other indifferent sum of money of theirs which accidentally came into his hands.

The simple nature of this transaction was plainly neither more nor less, than a deposition of the bill on Glyn and Halifax, with the petitioner, upon certain conditions, on the existence of which the bill was to be applied for payment of the draughts made in favours of the respondents, and of Mess. St. Clair and Seton. But nothing is more trite law, than that a depositary must discharge himself of a deposition, in the precise terms in which the deposition was made, and in no other. He cannot defeat the purpose of the deposition upon any argument or pretext whatever, though he should have been creditor *ab ante*, or may become creditor after the deposition. He cannot pretend to apply the depote to the payment of his own debt, either upon a plea of compensation, or retention, or any other method, either direct or indirect, but must deliver it up precisely as it came to his hands, in the way and manner prescribed in the conditions or articles of deposition.

This is expressly laid down in the Civil law, in the following text: 'Si quis vel pecunias, vel res quasdam per de-



positionis acceperit titulum, eas volenti ei qui deposuit reddere illico modis omnibus compellatur: Nullamque compensationem, vel deductionem, vel doli exceptionem, opponat: Quasi et ipse quasdam, contra eum qui deposuit, actiones personales, vel in rem, vel hypothecariam, prætendens, cum non sub hoc modo depositum acceperit, ut non concessa ei retentio generetur, et contractus qui ex bona fide oritur ad perfidiam retrahatur. Sed et, si ex utraque parte aliquid fuerit depositum. Nec in hoc casu compensationis præpositio oriatur; sed depositæ quædam res, vel pecuniæ ab utraque parte, quam celerrime, sine aliquo obstaculo, restituantur, ei videlicet primum, qui primus hoc voluerit, et postea legitimæ actiones integræ quoque ei referentur. Quod obtinere (sicut jam dictum est) oportet; et si ex una parte depositio celebrata est, ex altera autem compensatio fuerit opposita, ut integra omni legitima ratione servata, depositæ res vel pecuniæ prima fronte restituantur, L. 11. C. Deposit.

To the same purpose, in L. 14. § 1. C. 'De Compensationibus,' after mentioning the cases in which compensation can be proposed, this exception is added, 'excepta actione depositi secundum nostram sanctionem in qua nec compensationi locum esse deposuimus.'

Hitherto the respondents have argued the case altogether independent of the letter of the 16th of December, wrote by Mr Innes to Mr Scot. But, when that letter is taken into consideration, it is extremely clear, that he accepts the deposition in the very terms in which it had been made; after mentioning his concern about Mr Scot's fears of Annand and Co. he says, 'I notice you had drawn on them to Gibson and Co. 60 days date, L. 600, to James Seton L. 100, and to Andrew St Clair L. 100, L. 200 which you desire I may accept for your honour, which I shall do if necessary.' Here he agrees in the most explicit terms to accept these bills, in case of necessity; and, what that necessity was,

is very clearly explained by the letter to which this was an answer, viz. ' If not (*i. e.* if Mess. Annand and Colhoun, ' are not going on) I have directed Mr Colhoun to send ' them to your good self, if the holders will take that trouble; and I beg you will accept them for my honour.' Here then he clearly agrees to what had been proposed to him, in case Annand and Colhoun should stop payment; but, as to the other part of the letter, he says, ' I have ' Johnston and Co's bill on Glyn and Co. due January 24. ' L. 800, to your credit. I see you desire I may give Annand ' and Colhoun said bill, if they are going on; as to which ' I shall consider.' These words cannot be interpreted so as to import, that, in case Annand and Colhoun had not stopped payment, he was to consider whether he was to send Johnston and Smith's bill to them, or to apply it to his own use. They plainly mean that he was to consider, from circumstances, whether Annand and Colhoun were going on in such a manner, as that it was probable they would not stop, so as that it might be safe to send them the bill, or whether it was proper to retain it, lest it might be lost by being put into their hands. This is plain from the words that follow: ' I was out of town to day, and have not seen ' them, nor heard of them.' These words plainly import a reason for his not returning a positive answer concerning his sending this bill to them, and for his taking time to consider what he should do.

If the petitioner, upon receiving the letter of the 12th, and the money then remitted to him, had immediately wrote to Mr Scot, that he would not accept of the trust, but would apply the money for his own behoof, and for the payment of his own debt, he would at least been relieved of the argument of his having accepted of the depositation, although, even in that case, the respondents are advised, upon the principles already submitted, that it was not in the power of Mr Innes to apply money for his own behoof which had been lodged in his hands *ex*

*pro-*

*proposito*, and for the special purpose of paying a debt due to the respondents. But the case of the petitioner is even worse; for he does expressly takes the money, and acknowledge the receipt of it for the behoof of a third party: so that the transference of the property from Scot to the respondents was, beyond all exception, fully completed. There was a trust reposed, and a mandate given for the execution of that trust by Scot's letter of 12th December: That trust and mandate is accepted of by the letter of the 16th, and expressly intimated to the persons for whose behoof it was done by the transaction of the 13th; so that, upon what principle the petitioner can be permitted to overturn the whole of the transaction, without an absolute breach of trust and faith, merely because the subsequent bankruptcy of Scot rendered it his interest to do so, is to the respondents incomprehensible.

The petitioner argues, that, even when a person agrees, at the desire of another, to answer a draft, or pay a sum of money for him, he is at liberty to refile *si res devenit in aliam causam*, which was very much his case, on account of the supervening bankruptcy of Scot, which sufficiently justified the petitioner in not fulfilling his engagement by answering these drafts to the respondents.

But it will readily occur to your Lordships, that the petitioner is here arguing a general topic, which does not apply to the case in hand. There is not here a voluntary engagement on the part of the petitioner to pay a sum of money out of his own pocket for behoof of Mr Scot; neither is this a transaction in which Mr Scot and the petitioner were alone concerned; but there is here a sum of money put into the petitioner's hands for the behoof of the respondents, and in which Mr Scot, after his intimation to them, ceased to have any interest, or any power over it; and therefore, the question is not, whether, upon account of the supervening bankruptcy of Scot, the petitioner is re-

lieve<sup>d</sup>



lieved of the obligation he had come under to him ; but, whether he is at liberty, on that account, to apply for his own payment a sum of money put into his hands for the behoof of the respondents, and the receipt of it acknowledged by him for the special purpose of answering the respondents debt?

Having thus laid before your Lordships their case, as it casts up upon the evidence before you, and the principles of law arising from that evidence, the respondents beg your Lordships attention to the case of Bisset and Stuart, decided last winter, which is fairly stated in the petition, and which is so exactly in point to the present case, that the respondent cannot discover how it is possible to point out any one differencing circumstance, except that the names in the one case was Andrew Stewart writer to the signet and James Bisset merchant in Perth ; whereas, the parties in this other are Messrs Gibson and Balfour merchants in Edinburgh, and Mr William Innes merchant in London. The facts in both cases are the same ; the grounds of law insisted upon in both are the same ; and it is not doubted but your Lordships will apply the same principles which were decisive in the former case to the one now under your consideration.

The petitioner says, that his case ought to be differently considered, he being the ordinary factor and correspondent of Mr Scot at London, and the money remitted to him in the course of that connection ; and the respondents cannot plead a *jus quesitum* to themselves on account of the private instructions which may have intervened in the private letters betwixt the petitioner and their constituents.

The respondents have already stated to your Lordships the grounds upon which they apprehend they had undoubtedly a *jus quesitum* to this money before ever it came into the hands of Mr Innes. And as to the circumstance of his being the factor and ordinary correspondent of Mr Scot, it cannot possibly

sibly vary the case; for it clearly was not in that character that this money was remitted to him. If Annan and Colquhoun had been to stand their ground, it was not even intended that the money should remain with the petitioner; so that it does not occur in what respect Mr Scot, making choice of a person with whom he had other transactions, to be his depositary for the behoof of the respondents, in his transactions with them, can intitle the petitioner, in prejudice of a third party, to invert altogether the nature of the transaction, and to make a sum of money remitted to him, and accepted by him, for the behoof of a third party, a remittance for payment of his own debt. The only apology for doing so which has been suggested, is the supervening bankruptcy of Mr Scot; but your Lordships will have observed, that the same apology occurred in the case of Bisset and Stuart. But, as it merited, so it met with no regard from your Lordships.

The petitioner throughout has been pleased to represent his case as singularly unfortunate, if deprived of this money, being an onerous creditor to Mr Scot in a sum of L. 2000 Sterling.

It would not vary the matter, if the petitioner was creditor to Mr Scot for ten times that sum. But the petitioners own letter, of the 18th of December, recited in the petition, shows, that this sum is greatly exaggerated; for, even including bills that were then running, the petitioner makes the whole of the debt about L. 1200; and the petitioner has taken care, that very little of this sum will be lost to him; whereas, the success of the respondents in this cause, is the only chance they have for recovering this L. 600, having done no diligence for that sum, taking it for granted, as they were advised, that the petitioner was undoubtedly their debtor for it. But, as already observed, these are matters of disquisition foreign to the purpose, and will not be regarded

garded by your Lordships. One thing is certain, that, if it had been understood, that the petitioner had been to rear up this claim upon the deposit which was put in his hands, he never would have touched a farthing of the money; so that he, in a competition with the respondents, is the last person in the world intitled to complain of his bad fortune in being deprived of it.

And, upon the whole, it is hoped, your Lordships will have no difficulty in adhering to the Lord Ordinary's interlocutors, and refusing the desire of this petition.

*In respect whereof, &c.*

**HENRY DUNDAS.**

It would not vary the matter, if the petitioner was creditor to Mr Scot for ten times that sum. But the petitioner's own letter, of the 18th of December, recited in the petition, shows, that this sum is greatly exaggerated; for, even including bills that were then running, the petitioner makes the whole of the debt about £. 1200; and the petitioner has taken care, that very little of this sum will be lost to him; whereas, the losses of the respondents in this cause, is the only chance they have for recovering the £. 2000, having done no diligence for that sum, taking it for granted, as they were advised, that the petitioner was undoubtedly their debtor for it. But, as already observed, these are matters of distinction foreign to the purpose, and will not be regarded.